No. 00-1762

(3)

Supreme Court, U.S.
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In The
Supreme Court of the United States

C.M., a minor, by and through her parents;
J.M. and E.M., and on their own behalf,
Petitioners,

v.

THE BOARD OF EDUCATION OF HENDERSON COUNTY,
a/k/a Henderson County Public Schools; DAN G. LUNSFORD,
Education Department Superintendent; LINDA R. HAWK, Chairman;
JACKIE H. HORNSBY, Vice Chariman; ERVIN W. BAZZEL;
BRENDA O. BROCK; ALLEN A. COMBS; THOMAS E. ORR;
THOMAS B. PRYOR; JUDY DIANE HARTMAN COOK,
in their official and individual capacities,
Respondents.

M.E. and P.E.,
on their behalf and on behalf of their son, C.E.,
Petitioners,

v.

THE BUNCOMBE COUNTY BOARD OF EDUCATION,
a/k/a Buncombe County Public Schools,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I IF THIS COURT'S DECISION WILL BE ADVISORY, THE FOURTH CIRCUIT'S DECISION WAS ADVISORY AND SHOULD BE REVERSED.

In its brief at page 12, Respondent argues Petitioners are not aggrieved parties, thus lack standing to seek redress by this Court. It further argues that this Court, like all federal courts, under U.S. Const. Art. III §2 and *Carolina v. Rice*, 404 U.S. 244, 246 (1971) cannot provide advisory opinions. Petitioners agree with this statement of law but contend that Petitioners are aggrieved and do have standing to bring this Petition.

Based on Respondent's argument and contentions, the Fourth Circuit's decision in this case violates the very provision that Respondent argues as supporting Respondent's position that this Court cannot hear this appeal. For, if Petitioners were not aggrieved by the application of the sixty day statute of limitations, the Fourth Circuit decision holding that North Carolina's sixty day statute of limitations would constitute an impermissible advisory opinion.

Rather than issuing a decision that obviously violates U.S. Const. Art. III §2, the Fourth Circuit would have written, "having concluded the proper notice was not provided to trigger the application of the sixty day statute of limitations, we need not and may not determine whether that is the most analogous statute to apply or whether it violates the underlying policy of the IDEA." To the contrary, the Fourth Circuit wrote:

> Thus, we hold the 60-day limitations period in § 150B-23 is the period associated with the state statute, § 115C-116, most analogous to the IDEA.[3] [footnote omitted] . . . *CM v. Bd. of Ed. of Henderson County* 241 F. 3d 374, 380 (4th Cir. 2001)

> . . . Accordingly, although we recognize that in *Schimmel,* we concluded that policies embodied in the IDEA required that we reject a short limitations period,. . . we conclude that adoption of this 60-day limitations period is not inconsistent with federal policies animating the IDEA.
>
> . . . The parents in each case before us contend that even if we should hold, as we now have, that the 60-day limitations period applies to requests for IDEA administrative due process hearings in North Carolina, it does not bar their claims because they did not receive the required notice of the limitations period. . . . *CM, supra* at 384-385.

See also, footnote 12.

> [12] The basis for the district court's holding in *CM* that school authorities provided notice with respect to the 1993-1994 and 1994-1995 school years is unclear. It appears that the district court may not have actually resolved this issue, focusing only on the notice provided as to the 1995-1996 year. **We remand this issue to the district court**, expressing no view on whether notice complying with the statute was provided in the earlier years. We also note that although the ALJ found CM's parents' claims for reimbursement in the 1993-1994 and 1994-1995 school years barred for additional reasons, the district court did not address these reasons, and so we will not consider them in the first instance. *CM, supra* @ 388. (Emphasis added)

Thus, the Fourth Circuit did apply the sixty day statute of limitations to Petitioners. While it reversed the lower courts based on the notice provision as to the 1995-1996 school year due to the failure of the school district to provide proper notice to trigger the running of the statute of limitations. It remanded the case to the District Court for a determination as to whether the Court could find proper notice was given to deny CM's 1993-1994 and 1994-1995 claims.

Either the Fourth Circuit committed reversible error by providing an advisory opinion contrary to U.S. Const. Art. III §2 and *Carolina v. Rice*, 404 U.S. 244, 246 (1971) as argued by Respondent or Petitioners are in fact aggrieved parties and have standing to appear before this Court. In either case, this Court should grant the Petition for Certiorari and reverse the Fourth Circuit's decision in the *CM* and *ME* cases.

II CONTRARY TO EXISTING THE DECISIONS OF THE 1ST, 3RD, 6TH, 8TH, 9TH, 11TH AND D.C. CIRCUITS, ONLY THE 4TH CIRCUIT ADOPTED A 60 DAY OR LESS LIMITATIONS PERIOD FOR INITIAL DUE PROCESS PETITIONS

At page 20 of its brief, Respondent argues the "numerous federal courts similarly have concluded that state administrative procedures laws are most analogous . . . and short limitations periods found within such laws are consistent with the IDEA's goals of prompt resolution of disputes over the education of children with disabilities." referencing the court to *Birmingham*, 17 F. Supp. 2d at 863 (applying Arkansas' 30 day period). Respondent's argument and citation fails to note that the District Court's decision was reversed by the Eighth Circuit in *Birmingham v. Omahas School Dist.*, 220 F.3d 850 (8th Cir. 2000).

In the recent decision of *S.V. v. Sherwood School Dist.*, 254 F.3d 877 (9th Cir 2001), in deciding to apply a two year statute of limitations, the court relied on: *James v. Upper Arlington City Sch. Dist.*, 228 F. 3d 764, 769 (6th Cir 2000) (holding that either a four-year or a two-year limitations period applies to claims under the IDEA in Ohio for reimbursement); *Birmingham v. Omahas School Dist*, 220 F.3d 850 (8th Cir. 2000); (holding that the three-year statute of limitations applicable to §1983 actions in Arkansas governed IDEA claims reversing District Court's application of 30 day statute of APA); *Manning by Manning v. Fairfax County Sch. Bd.*, 176 F. 3d. 235, 239 n. 3 (4th Cir. May 3, 1999) (holding that, in Virginia, a one-year limitations period applies to a request for administrative hearing on a claim alleging a violation of the IDEA); *Murphy v. Timberlane Reg'l Sch. Dist.*, 22 F.3d 1186 (1st Cir. 1994) (applying New Hampshire's "catchall" six-year statute of limitations to a claim for compensatory education under the IDEA); *Strawn v Missouri State Bd of Educ.* 210 F. 3d 954 (8th Cir 2000) (adopting a two year rather than a five year statute of limitations); *Zipperer v. School Board of Seminole County, Florida*,111 F.3d 847 (11th Cir. 1997) (where the 11th Circuit borrowed the four-year Florida statute of limitations applicable to claims based on a statutory liability and rejected the 30-day limitations urged by the school district, while pointing out in footnote 1, in its earlier *JSK* decision it had noted in dicta it would likely borrow the 30 day limitations period for substantive appeals under section 1415(e)(2)).

In the remainder of the string citations in footnote 5 of Respondent's brief virtually all of their citations pertain to limitations for appeals from administrative hearings rather than filing of initial due process complaints. *See: Speigler v. District of Columbia*, 886 F.2d 461 (D.C. Cir. 1989); *Adler v. Education Dept.*, 760 F.2d 454 (2nd Cir . 1985).

As was pointed out by the Department of Justice in its Amicus Brief field in the Fourth Circuit opposing the application of the sixty day limitations period, prior to this decision, no court of appeals, including the Fourth Circuit in *Manning by Manning v. Fairfax County Sch. Bd.*, 176 F. 3d. 235 (4th Cir. May 3, 1999), has upheld application of a statute of limitations as short as 60 days. *See, e.g., Bernardsville Bd. of Educ. v. H.H.*, 42 F.3d 149, 158 (3rd Cir. 1994) (finding that one year is an appropriate time limit for requesting a due process hearing); *Murphy, supra* (six year statute) *Alexopulos v. San Francisco Unified Sch. Dist.*, 817 F.2d 551, 555 (9th Cir. 1987) (applying a three year statute). Clearly, the Fourth Circuit is not aligned with the other Circuit Courts of Appeals.

Petitioners contend in Respondent's brief, it misconstrues *Pawlisch, Letter to*, 29 IDELR 1088 (OSEP October 22, 1997) and *Raskin, Letter to*, 17 EHLR 1116 (OSEP February 25, 1991). Contrary to Respondent's suggestion, neither *Raskin, supra*, not *Pawlisch, supra*, implied the limitations period established an absolute and close-ended 60-day period. In fact, the letters make it clear that pursuant to 20 U.S.C. § 1415(b)(1)(E) (1990) now 20 U.S.C. § 1415(b)(6) (1997) and 34 C.F.R. 300.506 (1996) now 34 C.F.R. 303.420 (1998) a parent could request an IEP meeting at any time to seek a modification of their child's IEP and pursue their child's due process rights if such a request resulted in a disagreement. Thus, Respondent's attempt to limit the application of *Raskin, supra*, and *Pawlisch, supra*, is misguided.

Similarly, Respondent argues that *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) and *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 66 (1986) stand for the proposition that federal courts do not defer to agency interpretations of federal law when the agency's interpretation would alter the express intent of Congress and

an Agency's interpretive guidance is not controlling upon the courts by reason of their authority. In *Kmart, supra*, at pages 291 and 292, the court wrote:

> . . . The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress. . . . If the statute is silent or ambiguous with respect to the specific issue addressed by the regulation, the question becomes whether the agency [486 US 292] regulation is a permissible construction of the statute. . . . If the agency regulation is not in conflict with the plain language of the statute, a reviewing court **must** give deference to the agency's interpretation of the statute. *United States v. Boyle*, 469 US 241, 246, n 4, 83 L Ed 2d 622, 105 S CT 687 (1985). (Emphasis added)

The *Meritor,* court at page 65 wrote:

> . . . [T]he EEOC issued Guidelines . . . While not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. . . .

Respondent also cites *United States v. Mead Corp.*, 533 U.S. ___ , ___ 121 S.Ct. 2164, 2171 (2001) for the proposition that Ill-founded or misguided agency notions must yield to well-grounded and better reasoned contrary judicial interpretation of legislative intent. In *Mead,* this Court wrote:

> We granted certiorari, 530 U.S. 1202 (2000), in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute. **We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.** Delegation of such authority may be shown in a variety of ways, as by an agencys power to engage in adjudication or notice-and-comment rule making, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify, although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand. *Mead, supra,* at __ (Emphasis Added)

Unlike the Customs department, pursuant to 20 U.S.C. 1416 (1991) OSEP was given the power to engage in adjudication or notice-and-comment rule making. Thus, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the *Raskin,* and *Pawlisch,* letters should have been given deference by the courts below. Furthermore, due to the fact that both letters are better reasoned than the decisions of the courts below, based on *Mead, supra,* and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), even if the OSEP letters were not entitled to the *Chevron* deference, they would still be entitled to deferential consideration. Adding the fact that *Pawlisch* is also based on U.S. Supreme Court, authority as well as authority from the First and Seventh Circuit Courts of Appeals, the judicial deference should have been substantial, rather than no deference as advocated by Respondent.

III REJECTION OF THE UNPROVEN IN FAVOR OF THE SCIENTIFICALLY PROVEN IS PROPER

Lovaas or Lovaas type Applied Behavioral Assessment educational programs are the only programs in the world (for children suffering from autism) that provide the opportunity for normal functioning or recovery and that are supported by empirical scientific data as to their effectiveness. Thus, like this Court in the cases of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993) and *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999), Petitioners rejection of hypothetical or established educational programs, such as TEACCH, which are not supported by scientific research was warranted.

Respondent asserts at p. 6, "Both parents [of CM] testified that the only program they would have accepted for CM was the Lovaas program.." This statement mischaracterizes the testimony of CM's father and mother. Both had tried the TEACCH program as well as many other programs and other interventions. In summary, their testimony was they only received significant positive educational progress in the Lovaas program. On the other hand, it was the members of the School District that made it clear they would not consider offering the only scientifically proven Lovaas type program.

At p. 8-9 of its brief, Respondent asserts that "M.E. stated she would reject a program with a comparable amount of in-home, one-on-one instruction based on the TEACCH method." TEACCH does not do in-home, one-on-one instruction. In addition, M.E.'s son was never offered a comparable amount of in home one-on-one instruction based on any method. The fact that her son, as Respondent notes in its brief at p. 9 "no longer qualified for services" or recovered from autism, after completing his Lovaas program,

corroborates the scientific proof of the Lovaas program. Thus, this serves as an additional rational basis for ME to have rejected a hypothetical program.

At p. 9, of its brief, referring to ME, Respondent asserts: "The parents never responded and no negotiations between parents and Buncombe County Schools regarding services took place after February of 1997." Having successfully completed his Lovaas program so that CE no longer qualified for special education services, it would not make sense to continue to negotiate about services. However, as Respondent makes clear at the bottom of p. 9, the parties continued to negotiate regarding reimbursement for past services.

CONCLUSION

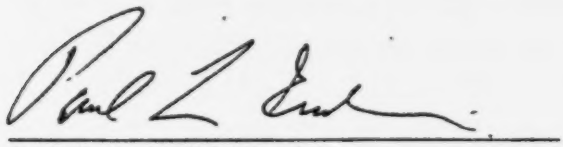
While, procedural safeguards are primarily instituted for the protections of the disabled children, school districts may also take advantage of them. The 45 day and 30 day provisions for conducting due process hearings are available to all parties. Those time limitations, if they are enforced, provide appropriate protections to disabled children and to school districts. The Courts below ignored or overlooked the significance of 45 day and 30 day time limitations imposed by our Legislature. (See: 34 C.F.R. 300.511) Because their decisions were issued well beyond the maximum time lines allowed by the Act, (534 days after the Initial Petition for Contested Case Hearing was filed and 255 days beyond the close of evidence at the local level and 73 days beyond the filing of the appeal at the state level) CM was not able to take advantage of the provision of the decisions requiring the school to use her Lovaas trained aide.

Instead of enforcing the time limitations set by our Legislature for the protection of the disabled, the courts below elected to establish a sixty day limitations period that

will only be used to the detriment of the disabled children. Such action is repugnant to the underlying policy of the IDEA and must be reversed before its application has a chance to infect other school districts throughout the United States.

Respectfully submitted, this the 7th day of August, 2001.

THE LAW FIRM OF PAUL L. ERICKSON, P.A.



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